APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1805

GARLAND JEFFERS,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 12, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

In the Supreme Court of the United States

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INDEX TO APPENDIX

NOTE: The opinion of the United States Court of Appeals for the Seventh Circuit is printed in Appendix A to the Petition for Writ of Certiorari.

The order denying rehearing in the United States Court of Appeals for the Seventh Circuit is printed in Appendix B to the Petition for Writ of Certiorari.

A CHRONOLOGICAL LIST OF IMPORTANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD AND ORDERS ENTERED

March 18, 1974—Indictment filed in Hammond Criminal 74-56 charging Jeffers and others with conspiracy to distribute heroin; indictment filed in Hammond Criminal 74-57 charging Jeffers with a continuing criminal enterprise.

April 9, 1974—Government filed Motion for trial together in Hammond Criminal 74-56; the Motion requested that the conspiracy and the continuing criminal enterprise charges tried together.

April 29, 1974—Jeffers and other defendants in Hammond Criminal 74-56 filed objections to Government's Motion for trial together and memorandum in support thereof.

April 30, 1974—The trial court held arguments on the government's Motion for Trial Together; docket entered in Hammond Criminal 74-57 to this effect.

May 7, 1974—The trial court denied on the government's motion for trial together.

June, 1974—Jeffers was tried and convicted on the conspiracy charge and was sentenced to fifteen years.

March 5, 1975—Jeffers filed Motion to Dismiss the continuing criminal enterprise indictment because of double jeopardy.

March 10, 1975—Government filed Response to Defendant's Motion to Dismiss indictment.

March 11, 1975—The trial court denied Jeffers' Motion to Dismiss the indictment because of double jeopardy.

March 17, 1975—Jeffers' continuing criminal enterprise trial began.

March 26, 1975—Jeffers convicted of a continuing criminal enterprise

May 9, 1975—Jeffers sentenced to life, fined $100,000. The life sentence to run consecutive with sentence imposed in Hammond Criminal 74-56.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

H CR 74 57

Sec. 848, Title 21 USC

[Filed Mar. 18, 1974, at .....M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

GARLAND JEFFERS, AKA PETERMAN

The Grand Jury charges:

On or about the 1st day of November, 1971, the exact date is to the Grand Jury unknown, and continuing to the date of this indictment, in the Northern District of Indiana, and elsewhere, GARLAND JEFFERS, aka PETERMAN, defendant herein, knowingly and unlawfully did engage in continuing criminal enterprise in that he did distribute and possess with intent to distribute heroin, in amounts to the Grand Jury unknown, a Schedule I Narcotic Drug controlled substance in violation of Title 21 United States Code, Section 841(a)(1), a felony, and cocaine, in amounts to the Grand Jury unknown, a Schedule II Narcotic Drug controlled substance, in violation of Title 21 United States Code, Section 841(a)(1), a felony, and undertook such distribution in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial in-

come in violation of Section 848, Title 21 of the United States Code.

A TRUE BILL

/s/ Donald G. Eldridge
Foreman

/s/ John R. Wilks
JOHN R. WILKS
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

H-CR-74-56

Sec. 846, Title 21, United States Code

[Filed Mar. 18, 1974, At ____M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

GARLAND JEFFERS A/K/A PETERMAN, WILLIAM DOUG DAVIDSON, WARNER S. SMITH A/K/A TOJO, LEROY WILLIAMS A/K/A CARCHETTI, NATHANIEL JEFFERS A/K/A RAWHIDE, CECELIA WILLIS A/K/A DEE DEE, CLINTON BUSH, PAUL GRIFFIN, WILLIE J. WILLIAMS A/K/A JAMIE, ANGELIA Y. HARRIS

The Grand Jury charges:

From on or about November 1, 1971, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of this indictment in the Northern District of Indiana and elsewhere, GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, WARNER S. SMITH a/k/a TOJO, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, CECELIA WILLIS a/k/a DEE DEE, CLINTON BUSH, PAUL GRIFFIN, WILLIE J. WILLIAMS a/k/a JAMIE, and ANGELIA Y. HARRIS, the defendants herein, and WILLIAM DOUGLAS, HENRY HARRIS and JAMES POOLE, co-conspirators but unindicted, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers others persons whose names are to the Grand Jury unknown, to commit offenses against

the United States and to violate Section 841(a)(1), Title 21 of the United States Code, to-wit: to distribute heroin, a Schedule I Controlled Substance and to distribute cocaine, a Schedule II Controlled Substance, in violation of Section 846, Title 21 of the United States Code.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendants and co-conspirators and others unknown to the Grand Jury would form and continue to operate an organization known as ""The Family".

(b) The purpose of "The Family" organization was to engage in the distribution of heroin and cocaine, controlled substances and control the tariff in heroin and cocaine in and around the city of Gary, Indiana.

(c) It was part of the conspiracy that the defendant, GARLAND JEFFERS a/k/a PETERMAN, would during the period of time of the conspiracy the exact date being unknown to the Grand Jury, assume leadership of "The Family" organization.

(d) It was further part of the conspiracy that the defendants would maintain books and records of "The Family" organization's meetings and discussions and of transactions involving the distribution of controlled substances.

(e) It was further part of the conspiracy that the defendants herein would extort and attempt to extort money and narcotics from individuals engaged in the distribution of controlled substances.

(f) It was further part of the conspiracy that the defendants and co-conspirators herein would distribute controlled substances and arrange for the distribution of controlled substances by others.

(g) It was further part of the conspiracy that the defendants and co-conspirators herein would acquire substantial sums of money because of the distribution of controlled substances.

(h) It was further part of the conspiracy that defendants, CLINTON BUSH, WILLIAM DOUG DAVIDSON and LEROY WILLIAMS a/k/a CARCHETTI,

would extort from co-conspirator, JAMES POOLE, money and narcotics in November of 1971.

(i) It was further part of the conspiracy that co-conspirator, HENRY HARRIS, would supply heroin to defendants, GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, LEROY WILLIAMS, a/k/a CARCHETTI, and PAUL GRIFFIN, for redistribution in November and December of 1971.

(j) It was further part of the conspiracy that defendants, GARLAND JEFFERS a/k/a PETERMAN and LEROY WILLIAMS a/k/a CARCHETTI, acquired cocaine in January 1972.

(k) It was further part of the conspiracy that members of "The Family" organization would have meetings on February 21, 1972, February 25, 1972, February 29, 1972, March 5. 1972 and March 7, 1972, for the discussion of the "Family" business of distribution of controlled substances.

(l) It was further part of the conspiracy that during February and March 1972 defendant, CECELIA WILLIS a/k/a DEE DEE, kept the books and records of "The Family" organization's business meetings and transactions and would receive proceeds of narcotics transactions.

(m) It was further part of the conspiracy that co-conspirator, JAMES POOLE, would deal controlled substances for "The Family" organization pursuant to an arrangement worked out with defendant GARLAND JEFFERS a/k/a PETERMAN.

(n) It was further part of the conspiracy that co-conspirator, JAMES POOLE, dealt in controlled substances for "The Family" organization on a regular basis with defendant, WILLIE J. WILLIAMS a/k/a JAMIE, delivering unknown quantities of narcotics and receiving unknown quantities of money.

(o) It was further part of the conspiracy that in December of 1972 co-conspirator, JAMES POOLE, possessed with the intent to distribute heroin for "The Family" organization and maintained books and records regarding these transactions.

(p) It was further part of the conspiracy that ARTHUR BUCKANON would sell one-half kilogram of

heroin to defendants, WILLIAM DOUG DAVIDSON and WARNER S. SMITH a/k/a TOJO, for $14,000.00 for redistribution by "Family" members and associates through defendant, GARLAND JEFFERS a/k/a PETERMAN.

(q) It is further part of the conspiracy that defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, ANGELIA Y. HARRIS, and WARNER S. SMITH a/k/a TOJO would negotiate a quinine for heroin exchange with Agent Melvin O. Schabilion of the Drug Enforcement Administration during the months of December, 1973, and January, 1974.

(r) It was further part of the conspiracy that defendant, LEROY WILLIAMS a/k/a CARCHETTI, would sell heroin to Agent Schabilion.

(s) It was further part of the conspiracy that defendant WARNER S. SMITH a/k/a TOJO, a member of "The Family" organization, would advise and work with "The Family" on a regular basis and participate in the acquiring and the posting of bond money when "Family" members were arrested.

(t) It was further part of the conspiracy that defendant, GARLAND JEFFERS a/k/a PETERMAN, would supply a quantity of cocaine to LEROY WILLIAMS a/k/a CARCHETTI in January 1974.

At the approximate time hereinafter mentioned the defendants GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, WARNER S. SMITH a/k/a TOJO, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, CECELIA WILLIS a/k/a DEE DEE, CLINTON BUSH, PAUL GRIFFIN, WILLIE J. WILLIAMS a/k/a JAMIE, ANGELIA Y. HARRIS, named herein along with co-conspirators, WILLIAM DOUGLAS, HENRY HARRIS and JAMES POOLE, unindicted co-conspirators, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

(1) On or about November 1, 1971, unindicted co-conspirator, JAMES POOLE, was confronted by defendants, CLINTON BUSH, WILLIAM DOUG DAVIDSON, and LEROY WILLIAMS a/k/a CARCHETTI, and forced to distribute controlled substances for "The Family" organization.

(2) On or about November 15, 1971, unindicted co-conspirator HENRY HARRIS, supplied heroin to defendants, GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, LEROY WILLIAMS a/k/a CARCHETTI, and PAUL GRIFFIN, for redistribution and received money for the heroin from defendant GARLAND JEFFERS a/k/a PETERMAN.

(3) During December 1971, unindicted co-conspirator, HENRY HARRIS, supplied heroin to defendant, GARLAND JEFFERS a/k/a PETERMAN.

(4) During January 1972 defendants, GARLAND JEFFERS a/k/a PETERMAN and LEROY WILLIAMS a/k/a CARCHETTI, acquired cocaine for redistribution from HARRIS, which acquisition came by force.

(5) On or about February 21, 1972, members of "The Family" organization including defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, PAUL GRIFFIN, CECELIA WILLIS a/k/a DEE DEE, and CLINTON BUSH, met for the purpose of discussing the business of "The Family" organization in the distribution of controlled substances.

(6) On or about February 25, 1972, "The Family" organization met and had a discussion of continuing the narcotics business following the arrest of "Family" members and to discuss the processing of heroin for distribution by "The Family" organization.

(7) On or about February 9, 1972, "The Family" members met which meeting included defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, and CECELIA WILLIS a/k/a DEE DEE.

(8) On or about March 5, 1972, members of "The Family" organization met to discuss distribution of heroin for distribution.

(9) On or about March 7, 1972, members of "The Family" organization met to discuss distribution of heroin and amounts of profit, and also agreed to the division of

the controlled substances that remained following a police raid.

(10) Early in 1972 defendants, GARLAND JEFFERS a/k/a PETERMAN and WILLIAM DOUG DAVIDSON, extorted money from WILLIAM DOUGLAS, unindicted co-conspirator.

(11) During March of 1972 GARLAND JEFFERS a/k/a PETERMAN arranged for JAMES POOLE, unindicted co-conspirator, to deal in controlled substances and made arrangements for co-defendant, WILLIE J. WILLIAMS a/k/a JAMIE, to supply heroin to unindicted co-conspirator, JAMES POOLE, and collect money from POOLE for payment to "The Family" organization.

(12) Defendant, WILLIE J. WILLIAMS a/k/a JAMIE, supplied controlled substances to JAMES POOLE, unindicted co-conspirator, for distribution and picked up money in payment thereof.

(13) On or about December 7, 1972, JAMES POOLE, unindicted co-conspirator, possessed with intent to distribute heroin belonging to "The Family" organization and maintained books and records regarding the distribution of controlled substances.

(14) On or about the 7th day of February, 1973, ARTHUR BUCKANON sold one-half kilogram of heroin to defendants, WILLIAM DOUG DAVIDSON and WARNER S. SMITH a/k/a TOJO, for $14,000.00 which heroin was for defendant, GARLAND JEFFERS a/k/a PETERMAN, and "The Family" organization.

(15) During December 1973 and January 1974, defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, ANGELIA Y. HARRIS, and WARNER S. SMITH a/k/a TOJO, negotiated a quinine for heroin exchange with Agent Melvin O. Schabilion of the Drug Enforcement Administration.

(16) On or about January 19, 1974, defendant, LEROY WILLIAMS a/k/a CARCHETTI, sold heroin to Agent Melvin O. Schabilion of the Drug Enforcement Administration.

(17) On or about January 2, 1974, defendant, GARLAND JEFFERS a/k/a PETERMAN, supplied cocaine to defendant, LEROY WILLIAMS a/k/a CARCHETTI.

A TRUE BILL

/s/ Donald G. Eldridge
Foreman

John R. Wilks
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Hammond Criminal No. H CR 74-56

[Filed Apr. 9, 1974, At ____M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

vs.

GARLAND JEFFERS, a/k/a PETERMAN; WILLIAM DOUG DAVIDSON; WARNER S. SMITH, a/k/a TOJO; LEROY WILLIAMS, a/k/a CARCHETTI; NATHANIEL JEFFERS, a/k/a RAWHIDE; CECELIA WILLIS, a/k/a DEE DEE; CLINTON BUSH; PAUL GRIFFIN; WILLIE J. WILLIAMS, a/k/a JAMIE; and ANGELIA Y. HARRIS

MOTION FOR TRIAL TOGETHER

Comes now the United States of America by its attorney, John R. Wilks, United States Attorney for the Northern District of Indiana, and moves the Court for trial together of the case of United States of America vs. Garland Jeffers, Hammond Criminal No. H CR 74-57 and the above-captioned cause, and in support of its motion represents to the Court the following:

1. That in the case of United States of America vs. Garland Jeffers, et al., H CR 74-56, the above-listed defendants are charged with Conspiracy to commit offenses against the United States and to violate Section 841(a)(1), Title 21, United States Code, to wit: to distribute heroin, a Schedule I Narcotic Drug Controlled Substance, and to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Section 846, Title 21 of the United States Code. This cause is set for trial as a first setting on May 20, 1974, at 10:00 a.m.;

2. That in the case of United States of America vs. Garland Jeffers, H CR 74-57, the defendant, Garland

Jeffers is charged with knowingly and unlawfully engaging in the Northern District of Indiana, in continuing criminal enterprises in committing violations of Section 841(a)(1), Title 21, United States Code, in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial income in violation of Section 848, Title 21 of the United States Code. This cause is set for trial as a first setting on June 17, 1974, at 10:00 a.m.;

3. That under Rule 13 of the Federal Rules of Criminal Procedure the Court may order two or more indictments to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information, and further that the procedure shall be the same as if the prosecution were under a single indictment or information;

4. That under Rule 8 of the Federal Rules of Criminal Procedure, the offenses and the defendants in the above-mentioned cause could have been joined in a single indictment of information in that the offenses charged are of the same or similar character based on the same acts or transactions constituting parts of a common scheme or plan and further that the defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count;

5. That much of the evidence in the case of United States of America vs. Garland Jeffers, H CR 74-57, is based on the same transactions and series of transactions as in the case of United States of America vs. Garland Jeffers, et al, H CR 74-56.

WHEREFORE, on the basis of the close relationship of the two causes and in the interest of economy and efficiency in judicial administration, the Government respectfully requests the Court to try together the case of United States of America vs. Garland Jeffers, et al., H

CR 74-56, and United States of America vs. Garland Jeffers, H CR 74-57, as a first setting on May 20, 1974.

Respectfully submitted,

JOHN R. WILKS
United States Attorney

By: /s/ Fred W. Grady
FRED W. GRADY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Criminal No. H Cr 74-56

[Filed Apr. 29, 1974, At ____M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, ET AL.

OBJECTION TO GOVERNMENT'S MOTION FOR TRIAL TOGETHER AND MEMORANDUM IN SUPPORT THEREOF

The Government has filed a motion for trial together, requesting that *United States* v. *Garland Jeffers*, No. H Cr 74-57 be consolidated with the above entitled cause for the purpose of trial on May 20, 1974. To this motion, the defendants interpose an objection and assert that the consolidation of *United States* v. *Garland Jeffers*, et al, No. H Cr 74-56 and *United States* v. *Garland Jeffers*, No. H Cr 74-57 would represent an improper joinder, prejudicing the rights of all defendants herein.

United States v. *Garland Jeffers*, et al, No. H Cr 74-56 represents an indictment of ten (10) defendants who are charged in one Count with a violation of Sec. 841(a) 1, Title 21 of the United States Code, which is a conspiracy to distribute heroin, a Schedule I Controlled Substance and to distribute cocaine, a Schedule II Controlled Substance, in violation of Sec. 846, Title 21 of the United States Code. *United States* v. *Garland Jeffers*, No. H Cr 74-57 represents an indictment of a single defendant, charging him with a violation of Sec. 848, Title 21 of the United States Code with engaging in a continuing criminal enterprise.

Simply stated, the defendants assert that an improper joiner would exist if the two (2) indictments were consolidated for the purpose of trial for the reasons that neither the parties nor the charges are the same and,

as such, would be violative of Rules Eight and Fourteen of the Federal Rules of Criminal Procedure.

As authority for this proposition the defendants cite the case of *United States* v. *Spector* (7th Cir. 1963) 326 F.2d 345, wherein the defendants, Spector and Scott were named as principal defendants in a nine (9) count indictment. In Count I of the indictment, they were charged with a conspiracy under 18 U.S.C. Sec. 371 to violate 18 U.S.C. Sec. 1006, (defrauding Federal Credit Institutions).

In Counts II through IX, Spector and two (2) others, namely, Jacobs and Starr, were charged with a violation of Title 18, U.S.C. Sec. 1010 (making false statements to the Federal Housing Authority). Both Spector and Jacobs were named as defendants in four (4) of the substantive counts while Spector and Starr were joined in two (2) counts. All three defendants were joined in the remaining two (2) counts.

The Court of Appeals recognized the similarity between Sections 1006 and 1010 since both relate to false statements and forged instruments made for the purpose of obtaining loans from lending institutions whose accounts are insured by Federal Agencies. Nevertheless, the Court held that a joinder of Count I of the indictment with the remaining counts runs afoul of Rule Eight which permits joinder of two (2) or more defendants in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

The Court of Appeals pointed out, however, that the defendant, Scott, was not charged with having participated in the acts or transactions alleged in Counts II through IX, nor were Jacobs and Starr charged with violating the substantive statute underlying the conspiracy count. The Court, therefore, held:

> "In conclusion, it is apparent in the instant case, that there is no identity of defendants, of the character of the offenses, the allegations of fact, or of the time. Therefore, a severance should have been granted." at p. 351.

Furthermore, the defendants cite the case of *United States* v. *Solomon* (1960) 26 F.R.D. 397 wherein the District Court for the Southern District of Illinois confronted a seven (7) Count indictment, the first six (6) Counts of which alleged substantive offenses of the Mail Fraud Act and the seventh (7) Count alleged a conspiracy between the defendants and others to violate that act. In first coping with the motion to sever the six (6) substantive offenses, the Court held:

> "The 6 substantive offenses charged are closely related in point of time, and each is alleged to be a part of a single continuing scheme to defraud. To some degree it appears that the same evidence may tend to prove each of the 6 counts . . . . The Court cannot say that the defendants will be prejudiced by a joint trial on the substantive counts." at p. 403.

The District Court reached a contrary conclusion with regard to the seventh (7) Count, namely that of conspiracy:

> "A more serious question is presented by the motion to compel election between the substantive counts and the conspiracy count. Of necessity, to some extent, a jury sitting on the trial of this cause will be faced with a mass of evidence relating to all, or a number of the counts, and also with evidence which relates to each count alone. While it appears to be true that much of the evidence introduced to prove the substantive counts will be relevant also to the conspiracy charge, trial of the conspiracy count with the substantive counts can be expected to flood the jury with a mass of evidence admissible on the conspiracy charge only. At best, contemplation of a trial of all seven (7) Counts simultaneously suggests that the situation would be very confusing for any jury. In its worst light, the contemplated situation inherently contains the probability of prejudice to defendants in as much as evidence admissible upon the conspiracy count alone, must perforce affect the jury's thinking when it con-

siders the fact questions presented by the substantive counts." at p. 403.

In the case at bar, the Government is attempting to consolidate a conspiracy of ten (10) defendants with a substantive offense of one (1) defendant. Such a consolidation should be viewed with disfavor.

> "If a prosecution for the substantive offense be adequate, inclusion of the conspiracy count should be carefully scrutinized and separate trials should be had if it appears that the conspiracy count, like a two-edged sword, serves a principal purpose to give the Government a procedural advantage and a corresponding advantage of probably prejudicial effect upon the defendants' rights." *Solomon* (supra) at p. 104.

The Government undoubtedly contends that to consolidate the two (2) causes above mentioned would save considerable time and expense. The Court in *Solomon* squarely raises this issue. The *Solomon* Court contends that there is no repugnancy between the counts of the indictment yet:

> ". . . in the exercise of a sound discretion it ought to compel the Government to elect whether it will proceed upon the conspiracy count or the substantive counts. *The added expense to the Government of time and money in trying the conspiracy and substantive charges separately is, of course, a factor to consider, but that is a factor of small moment compared to the probable prejudice to the defendants of disposing of all charges in one grandiose trial.*" (Emphasis ours) at p. 404.

There are ten (10) individuals indicted in the conspiracy count among other unindicted co-conspirators. The Government has alleged seventeen (17) overt acts perpetrated by some or all of the defendants, of which the defendant, GARLAND JEFFERS, is named in only ten (10) of said acts. Furthermore, it is anticipated that the Government will attempt to prove additional overt

acts other than those enumerated in the conspiracy indictment incriminating some or all of the defendants.

What is more, the Grand Jury has charged that the conspiracy in question was formed and remained in existence from November 1, 1971, until March 18, 1974, a period of approximately two and one-half (2½) years. By virtue of the confusing nature of a conspiracy charge, coupled with the fact that there are ten (10) if not more individuals involved in said conspiracy, compounded by the fact that it allegedly existed over an extensive period of time, it is contended that the trial of the conspiracy alone would constitute a difficult and confusing assortment of facts for a jury to entertain, segregate and evaluate. To stack an additional substantive offense such as "engaging in a continuing criminal enterprise", which is a most serious and complicated offense, on top of an already confusing conspiracy charge is to simply compound the complexity of the issues and to create an impossible if not Herculean task for the jury.

Such was the case in *United States* v. *Haupt* (1943) 136 F.2d 661 wherein the Court of Appeals for the Seventh Circuit confronted a one (1) Count indictment charging several defendants with various overt acts committed by some one (1) or more of the defendants. The charge against the defendants in this case was treason. The Court stated:

> ". . . that the introduction of evidence in a joint trial relating to said overt acts not alleged to have been participated in by all defendants might lead to confusion and prejudice as to those who had not participated in the said overt acts." at p. 673.

The Court further stated:

> "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any Court, could perform such a Herculean feat." at p. 672.

The Court held that the trial Judge abused his discretion in denying the motion for severence and in his failure to grant a new trial.

The defendants further suggest to the Court that the consolidation of the above two (2) causes for trial would be conducive, not only to confusion, but to clearly prejudice the rights of all defendants herein by creating a "steamroller" effect upon the minds of the jurors. The sheer aggregate of evidence amassed by the Government and provided to the jury would create an inference of criminal disposition based upon mere association with other defendants against whom the evidence is stronger. The consolidation of the above offenses would instill a serious hostility by the jurors against all of the defendants, despite the fact that there would be insufficient evidence on any given transaction or act to convict. In *Drew* v. *United States* (1964) 331 F.2d 85, the Court of Appeals for the District of Columbia stated:

> "The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) He may become embarrassed or confounded in presenting separate defenses; (2) The jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) The jury may accummulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the Court must weigh the prejudice to the defendant caused by the joinder against the obviously poor consideration of economy and expedition in judicial administration" at p. 88.

It is clear that the above considerations by the District of Columbia Court of Appeals loom large in the case

presently at bar. Furthermore, it is important to note that said considerations of prejudicial effect to the defendants are determinative, even though joinder may be permissible under Rule 8. *Dunaway* v. *U. S.*, 205 F.2d 23, 24 (1953); *Peckham* v. *U. S.*, 210 F.2d 693, 697-698 (1953); *Chambers* v. *U. S.*, 301 F.2d 564 (1962).

In *Drew* v. *U. S.* (supra) the Court of appeals for the District of Columbia addressed the issue of prejudice to the defendants when joinder was in fact permissible under Rule 8:

> "Thus even though the joinder is permissible under 8(a), if the defendant makes a timely motion under Rule 14 and shows prejudice, the Court should either order an election by the Government or grant separate trials. Here the joinder in the indictment under Rule 8(a) was permissible since the two crimes are similar in nature. Having in fact been tried together over the timely protest of appellant before, during and after the trial, our inquiry now is as to whether the trial record indicates sufficient possibility of prejudice by reason of such joinder for trial as to require reversal. We believe that it does." at p. 87.

The Court in *Drew* apparently established the rule governing whether a new trial should be granted as a result of the trial Court's refusal to grant a severance:

> "On this record, we cannot say that the jury probably was not confused or probably did not misuse the evidence. . ."

The defendants strongly urge the Court to consider the fact that they and each of them stands to be seriously prejudiced by a consolidation of the two (2) trials herein. Courts, from time in mind, have enunciated the danger in the consolidation of indictments. An excellent example is that of Judge Learned Hand in *U. S.* v. *Lotsch* 102 F.2d 35 (1939) wherein Judge Hand states:

> "There is indeed always a danger when several crimes are tried together, that the jury may use the

> evidence cumulatively; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition."

It is difficult to anticipate what if any evidence the Government intends to use in either of the above indictments since counsel for the defendants is not privy to such information, nor has there been any disclosure whatsoever by way of discovery by the Government to the defendants. It would however, seem fair to assume that there will be evidence relating to at least thirteen (13) separate individuals, that the evidence will embrace at least seventeen (17) alleged overt acts and that it will span a period of approximately two and one-half (2½) years.

It is noteworthy that the defendant, GARLAND JEFFERS, who is charged by himself in Cause No. H Cr 74-57 is named in only ten (10) of the seventeen (17) overt acts listed in the conspiracy indictment and further, is alleged to have actively participated in only nine (9) of those seventeen (17) acts. This being the case, it is likely that much of the evidence which will be presented in the conspiracy trial does not "directly" inculpate the defendant, GARLAND JEFFERS, and would, therefore, be inadmissible against him in the "continuing criminal enterprise" indictment unless a direct link could be established. All of the said overt acts would, however, be admissible, or at least arguably so, in the conspiracy trial. The prejudice to the defendant, JEFFERS, is therefore, imminent and clear.

It is suggested to the Court that the Government will offer evidence which may tend to suggest that the defendant, GARLAND JEFFERS, is in fact the "ring leader" and will do so by attempting to inculpate the defendant, JEFFERS, in one or two transactions directly and by way of insinuation and inference suggest that

he is responsible for all other transactions, thereby subjecting him to the provisions of Sec. 848, Title 21 U.S.C., to-wit: Engaging in a continuing criminal enterprise. The Government intends to offer evidence which is arguably admissible under the conspiracy statute so as to inculpate the defendant, evidence which would not be admissible in the continuing criminal enterprise indictment. Such was the tactic used by the Government in *King* v. *U. S.* 355 F.2d 700 (1st Circuit) where in footnote 6 the Court stated:

> "In connection with the July 14th sales in which King allegedly participated, King was "The Man". On McKenney's source of supply, the Government agent was unsuccessful in learning who was McKenney's "man" on the other occasions. It seems to us that it might be natural for the jury to fill this void with King. If it did, the Government was thereby showing other offenses by King not included in the indictment, the very thing it could not properly do and of which in fact it had no evidence warranting the inference."

In conclusion, the defendants assert that to consolidate the indictments as per the Government's request would constitute an improper joinder since there is neither an identity of defendants nor an identity of charges.

Secondly, assuming for the purpose of argument, that joinder is in fact permissible, the defendants contend that the consolidation of the above causes would irreparably prejudice the jury in an unjustifiable fashion against each of the defendants and would so confound and confuse the jury so as to make an impartial and fair determination impossible.

As an example of such confusion which can lead from improper joinder, see *U. S.* v. *Varelli*, 407 F.2d 735 (1969), which was decided by the Court of Appeals for the Seventh Circuit. It is therefore, for the above and foregoing reasons that the defendants object to the Gov-

ernment's motion for trial together and move the Court to deny said motion.

Respectfully submitted,

COHEN AND THIROS
Attorneys for defendants

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UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF INDIANA
HAMMOND DIVISION

No. H Cr 74-57

[Filed Mar. 5, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

v.

GARLAND JEFFERS, DEFENDANT

MOTION TO DISMISS THE INDICTMENT

Comes now the Defendant, Garland Jeffers, by his attorneys, Stephen Bower and E. Kent Moore, and respectfully moves that the Court dismiss the continuing criminal enterprise indictment against him for the reason that this Defendant has already been placed in jeopardy and in support thereof Defendant says:

1. That Garland Jeffers was indicted on March 18, 1974 on two (2) separate charges, to-wit: continuing criminal enterprise, being Cause No. HCR 74-57 and conspiracy to distribute heroin, being Cause No. HCR 74-56.
2. That the defendant, Garland Jeffers, was tried upon the conspiracy charge, was convicted, and has received an executed sentence; said defendant is currently serving time on this conviction.
3. That the conspiracy charge in HCR 74-56 involved proof that Garland Jeffers belonged to, and was the head of, an organization called the "Family" in Gary, Indiana, and that the purpose of this organization was the illegal distribution of heroin.
4. That the Defendant is currently charged with the crime of a continuing criminal enterprise beginning November, 1971, to distribute heroin.

5. Defendant alleges that the conspiracy and the continuing criminal enterprise charges grow out of the same alleged criminal behavior.

6. That as a matter of fact, several of the government's witnesses in HCR 74-56 (the conspiracy trial) will be the same in HCR 74-57; these witnesses are James Henry Poole, David Baldwin, Henry Harris, William Douglas, Jevita Hobbs, and Daniel Yaksich. These witnesses are all non-police officers; also, several of the same police officers will be called as witnesses. That the Defendant's trial on the continuing criminal enterprise will be a rehash of the conspiracy trial with additional elements.

7. Defendant alleges that the same evidence will be introduced against him in his second trial; that all of the evidence was available to the government at the time of his conspiracy trial.

8. That even though the government attempted to consolidate the two (2) charges into the trial on the conspiracy, this does not relieve the government from having made a choice upon which charge to try the Defendant, they are now estopped to try him on the other charge.

9. The government cannot avoid the implication of the double jeopardy rule by claiming that since the Defendant objected to the joinder of the continuing criminal enterprise charge in the conspiracy trial that he has waived his rights; Defendant contends that by exercising his constitutional right to have a fair trial, apart from a prejudicial joinder, he can't be held to have waived his double jeopardy right.

WHEREFORE, Defendant, Garland Jeffers, prays for dismissal of the indictment against him on the grounds of double jeopardy.

Respectfully submitted,

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GARLAND JEFFERS

The double jeopardy clause reads: "Nor shall any persons be subject for the offense to be twice put in jeopardy of life or limb; . . ." Justice Blacks' opinion in *Green* vs. *United States*, 355 U.S. 184 (1957), gives the clearest statement of the doctrine:

> (T)he State will all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . (355 U.S. at 187)

Collateral Estoppel, 48 Den.L.J. 130, 136 (1971); Lucker, Collateral Estoppel—An Attempted Transfusion into the Guarantee Against Double Jeopardy, 44 Temp.L.Q. 377 (1971); and Notes, 69 Mich.L.R. at 777.

In order to provide meaningful double jeopardy protection the American Law Institute Model Penal Code, § 1.07(2), provides:

> (A) defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial.
> (Model Penal Code § 1.07(2), Proposed Draft, 1962)

Along this same theme, the ABA Project of Minimum Standards for Criminal Justice, Joinder and Severance, § 1.3, afforded a Defendant the right to request joinder of all charges "based on the same conduct or arise from the same criminal episode." The Advisory Committee felt that a defendant should not be subjected to multiple trial on related offenses.

Other State jurisdictions, either by statute or by case decision, have come to the above statement of the law. Statutes in California, New York, Illinois, Minnesota, and Indiana have provided meaningful double jeopardy protection. See Calif. Penal Code 654; Ill. Rev. Stat. ch. 38, S3-3 (1963); N.Y.Crim. Proc.L. 40.30 (2), McKinney's Consol. Laws, C. 11-A; 40 Minn. Stats. Anno. 609.035; Indiana Code 35-3.1-1-10(c). Cases decisions to same effect are State v. Brown, 497 P.2d 1191, 1198 (Ore. S.Ct. 1972) and Commonwealth v. Campana, Pa., 304 A.2d 432 (1973). The net results of these statutes and case decisions is to adopt the rule of law as set forth by Justice Brennan, in a minority opinion in Ashe; Justice Brennan's statement reads as follows:

> This "same transaction" test of "same offense" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jepopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy and convenience.
> (397 U.S. at 454)

Defendant argues that by requiring compulsory joinder of all criminal charges in one indictment arising out of a single transaction is only fair and just. The defendant should not be forced to run the gauntlet of multiple prosecutions by an awesome government, whose resources are unlimited. Defendant contends that there is no specific guide line from the United States Supreme Court on the constitutional minimum standard. Defendant argues that the trial court should require the government to bring, in a single proceeding, all known charges against the defendant arising from a single criminal episode.

Applying this rule to the case at bar, the fact reveals that the defendant has been convicted of the charge of conspiracy to distribute heroin. Defendant contends that his current charge of a continuing criminal enterprise simply adds some other elements to the conspiracy charge. The charges arise out of the same illegal heroin traffic transaction in Gary, Indiana. Therefore, the second prosecution out of the same transaction is violative of the double jeopardy clause.

THE "SAME EVIDENCE" RULE

The defendant maintains that even if the Court applies the traditional same evidence rule as set forth in the majority opinion in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the Defendant is still entitled to a dismissal. Blockburger v. United States, 284 U.S. 299, 304 (1932) adequately states the law:

> Where the same act or transactions constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

The Defendant contends that if the government proves the continuing criminal enterprise charge, it will have proven the conspiracy charge all over again. In other words, the same evidence needed to prove the continuing criminal enterprise would also prove the conspiracy charge. A brief examination of the two respective statutes reveals this fact. Title 21, Sections 846 and 848.

The Defendant would cite as controlling the cases of *Hattaway* v. *United States*, 399 F.2d 431 (5th Cir. 1968), *Robinson* v. *Neil*, 366 F. Supp. 924 (D.C.E.Tenn., 1973), and *Rouzie* v. *Comm.*, 207 S.E.2d 854, Va., 1974. These cases held that conviction of a lesser included offense will bar the prosecution on the greater offense. Both of these cases applied the same evidence tests, and since no additional evidence was needed to prove the lesser included offense, prosecution on the lesser offense barred prosecution on the greater.

The continuing criminal enterprise charge requires proof of "a continuing series of violations (of the drug laws) which are undertaken by such person in concert with five or more other persons. . ." If an individual acts in concert with five or more to distribute heroin, there has been a conspiracy. The Court cannot avoid such a conclusion—there cannot be a continuing criminal enterprise without a conspiracy. Therefore, since the government has prosecuted the Defendant for the lesser

included offense of conspiracy, the government is prohibited from prosecuting for the greater offense of a continuing criminal enterprise. The government did not have to proceed to trial with this defendant in the conspiracy case, but it chose to do so. By so choosing, the government elected which of the two cases it was going to prosecute. The government, as powerful as it is, cannot continue in a series of prosecutions of the defendant based on the same facts. Justice under our constitution demands the dismissal of this indictment.

The defendant anticipates that the government will allege that the Defendant has waived his right to no double jeopardy by objecting to the consolidation of the continuing criminal enterprise charge with the conspiracy charge. Defendant argues to the court, that the Court found that such a consolidation would result in a prejudicial joinder against this defendant. The defendant, as a matter of constitutional law, is entitled to a fair and impartial trial. The defendant's efforts to require a fair trial for himself cannot be interpreted as a waiver of Fifth Amendment rights. More specifically, when the defendant exercises his Sixth Amendment right of demanding a fair trial, he cannot be held to have waived his Fifth Amendment rights of no double jeopardy. The government could have dismissed the conspiracy charge against this defendant, if it wanted the continuing criminal enterprise conviction. In Simmons v. United States, 390 U.S. 372 (1968) the United States Supreme Court made it clear that when a defendant testifies at a hearing on a search and seizure issue, his testimony cannot

be used again at the trial. Exercising a constitutional right cannot be held to be a waiver of other rights.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

H CR 74-57

[Filed Mar. 10, 1975 at 8:15 a.m.]

UNITED STATES OF AMERICA

vs.

GARLAND JEFFERS

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

Comes now the United States of America by John R. Wilks, United States Attorney for the Northern District of Indiana, and for its response to the Motion to Dismiss the Indictment by the defendant shows the Court as follows:

1. The charge in this cause H CR 74-57 is distinct and separate from the charge in H CR 74-56 which led to the conviction of the defendant.

2. There are additional required elements which the Government is forced to prove in a charge involving a continuing criminal enterprise.

3. Because the crimes are separate and independent offenses, the defendant is not put in jeopardy twice for the same offense.

4. The doctrine of collateral estoppel does not apply.

5. In support of the foregoing the Government submits the following memoranda of law in support of its response.

WHEREFORE, the United States of America prays that the motion of the defendant to dismiss the indictment be in all things denied.

JOHN R. WILKS
United States Attorney

By: /s/ Richard A. Hanning
RICHARD A. HANNING
Assistant United States
Attorney

MEMORANDUM IN SUPPORT OF GOVERNMENT'S RESPONSE TO MOTION TO DISMISS

Counsel for defendant has filed a motion to dismiss the indictment in the instant case on the basis that the defendant has been placed in jeopardy due to his trial and conviction in H CR 74-56. Such a contention is without foundation.

As the Court is well aware, the defendant was tried and convicted for conspiracy to distribute heroin in violation of Title 21, United States Code, Section 846. In the instant case, the defendant is charged with engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. The Government submits that the two statutes are separate and distinct violations and statutorily require different elements of proof. Contrast the elements necessary to be proven by the Government to sustain the conviction under Title 21, United States Code, Section 846, as opposed to Section 848. In a Section 846 prosecution the Government must prove the basic elements of conspiracy, that is to say, that two or more people have conspired to commit the offense and that during the pendency of the conspiracy at least one overt act was committed by one or more of its members in furtherance of the objective of the conspiracy. Title 21, United States Code, Section 848, requires proof of the elements previously set out in Section 846 but additional elements are required: (1) acting in concert with five or more people; (2) being in a supervisory position over these people; and (3) obtaining substantial income or resources from the enterprise.

As the Supreme Court held in *Blockburger* v. *United States*, 284 U.S. 299 (1932), when addressing the question of double jeopardy:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses

> or only one is whether each provision requires proof of an additional fact which the other does not.
>
> At page 182.

Clearly, in reviewing the two statutes, the issues there are different elements of proof required to sustain a conviction. The defendant is not entitled to a dismissal of the indictment. As the Court in *Blockburger* further stated:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.
>
> At page 182.

In addition to the rulings set out above, the Supreme Court has held that each case involving a question of double jeopardy must be decided on its own merits. In *Hoag* v. *State of New Jersey*, 356 U.S. 464, 78 S.Ct. 829 (1958) has stated:

> We do not think that the Foureenth Amendment always forbids states to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness.

The Court in *Hoag* went on to state:

> In the last analysis, a determination of whether an impermissible use of multiple trials has taken place cannot be based on any overall formula. Here as elsewhere, the pattern of due process is picked out in the facts and circumstances of each case.

To further strengethen the Government's contention, consider the case of *Ciucci* v. *State of Illinois*, 356 U.S. 571, 78 S.Ct. 839 (1958). In *Ciucci*, four separate indictments were returned charging the defendant with

murder of his wife and three children. All murders were committed at the same point in time. The defendant was tried in three successive trials with the murder of his wife, then followed by the trial for each of his children. He was convicted and sentenced to twenty years in trial number one, forty-five years in trial number two, and to death in trial number three. He appealed claiming double jeopardy and denial of due process. The Supreme Court held:

> The state was constitutionally entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence in the absence of proof establishing that such a course of action entailed fundamental unfairness.

The defendant points to *Ashe* v. *Swenson*, 397 U.S. 436 (1970) as controlling. In the opinion of the Government, the *Ashe* case goes to the question of the application of the doctrine of collateral estoppel, such a doctrine is not applicable here. "No issue tried in the prior conspiracy was determined in favor of the defendant. Thus collateral estoppel is not applicable." *Sealfrom* v. *United States*, 332 U.S. 575, 78, 79, 68 S.Ct. 237 (1948).

In summary, when considering that there are separate and distinct statutes involved, each require different elements of proof, the defendant cannot say in keeping with the authority cited, that the Government's course of action entails "fundamental unfairness".

John R. Wilks
United States Attorney

By: /s/ Richard A. Hanning
RICHARD A. HANNING
Assistant United States Attorney

[1051] COURT'S INSTRUCTIONS IN THE CONTINUING CRIMINAL ENTERPRISE TRIAL, H Cr 74-57

THE COURT: Members of the Jury:

[1] At this time it becomes the duty of the Court to instruct you on the law as it applies to this case.

It will be your duty as jurors to follow the law as the court states it to you. On the other hand, you must keep in mind that it is the exclusive province of the jury to determine the facts of the case, and for that purpose to consider and weigh the evidence.

[2] If in these instructions any rule, direction, or idea be stated more than once or in different ways, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all of the instructions as a whole, and you are to regard each instruction in light of all the others.

[3] You, the jury, are the sole and exclusive judges of all questions of fact and proof. It is your exclusive right to determine what facts have or have not been proven. [1052] You are also the sole judges of the weight of the evidence, and you have the exclusive right to determine what inferences and conclusions may reasonably be drawn therefrom.

However, it is the province of the Court to determine the law, and you are to be governed by the law as given to you by the Court. You must not permit sympathy, prejudice, or other emotions to sway you from your sworn duty. Upon the facts as you find them to be from the evidence, and the law as given to you by the Court, and otherwise, shall you determine your verdict.

[4] Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

The Court may take judicial notice of certain facts or events. When the Court declares that it will take judicial notice of some fact or event, you may accept the Court's declaration as evidence, and regard as proven the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judges of the facts.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and [1053] all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find them have been proven, such reasonable inferences as you feel are justified in the light of experience.

[5] It is the right and duty of attorneys for both the defendant and the Government to object to questions asked by opposing counsel when they feel that such objections are appropriate and necessary, and you are in no way to consider in your deliberations the frequency or nature of objections made by counsel for either side.

[6] During the progress of the trial, questions have been asked of certain witnesses which the Court did not allow them to answer. In your deliberations you will disre- [1054] gard those questions and everything contained in them and confine yourselves to a consideration only of the evidence before you. An unanswered question is of no value for any purpose and must be disregarded.

During the trial, answers of certain witnesses were, upon motion, stricken out by the Court. In your deliberations you will disregard such answers and give no consideration whatever to matters stricken from the record in forming your verdict.

[7] A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

[8] A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life.

[9] The burden of proving defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on cross-examination of witnesses for the Government. If the Government fails [1055] to prove the defendant guilty beyond a reasonable doubt the jury must acquit him.

[10] The guilt of the accused is not to be inferred because the facts proved are consistent with his guilt, but, on the contrary, before there can be a verdict of guilty you must believe from all the evidence and beyond a reasonable doubt that the facts proved are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt that of innocence.

[12] You are instructed that under the law the defendant is not required to testify, and if the defendant chooses not to testify you are not permitted to consider this in your deliberations. You may not consider the defendant's failure to testify as evidence; the defendant has the constitutional right to remain silent, and never has the burden of presenting evidence. The burden is always upon the Government to prove the defendant guilty beyond a reasonable doubt.

[13] A defendant may be proven guilty by either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the [1056] weight to be given either direct or circumstantial evidence; it requires only that the jury, after weighing all the evidence, must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted.

[14] The defendant is not on trial for any act or conduct not alleged in the indictment. Therefore, in deliberating on your verdict in this case, you should consider only matters which have been alleged in the indictment and will disregard those matters not alleged in the indictment.

[15] The mere presence of a defendant at the scene of a crime, without the defendant actively participating in its commission is not sufficient evidence upon which to convict such a defendant.

[16] You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an [1057] accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses,

may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

On the basis of these considerations, and your experience and relations with mankind, you should give the testimony of each witness such weight as you think it deserves.

[17] The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of the greater credence. You may find that the testimony [1058] of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

[18] In this case, you have heard the testimony of expert witnesses based upon their analyses of certain records, documents, and testimony which have been introduced in evidence. This class of testimony is proper and competent evidence concerning matters involving knowledge, skill or experience in a subject which is not within the realm of ordinary knowledge of mankind and which requires special training or study to understand. The law allows those skilled in special fields to express opinions and to say whether or not, according to their knowledge and experience, a fact may or may not exist.

Nevertheless, although such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound to the testimony of such experts is to be canvanssed and weighed as that of any other witness. Just so far as their testimony appears to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called an expert, and gives an opinion or opinions upon a particular point, does not

necessarily obligate the jury to accept his opinions as to what the facts are.

[1059] [19] The testimony of an informer who provides evidence against a defendant for pay, or from immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against the defendant.

The testimony of a narcotics addict who provides evidence against a defendant must also be examined and weighed by the jury with great care.

[20] The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

[21] The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given [1060] the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

[22] An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charge. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

[23] The Court instructs the jury that the testimony offered by officers shall not be given any greater weight [1061] or credibility by the fact alone of their office, but that such testimony shall be weighed and considered as to credibility on the same ground and for the same reason that the testimony of all other witnesses are weighed and judged.

[24] The testimony of an admitted perjurer should always be considered with caution and weighed with great care.

[25] The crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

[26] The defendant is charged in a one count indictment charging a violation of Title 21, United States Code, Section 848. The indictment reads as follows:

"On or about the 1st day of November, 1971, the exact date is to the Grand Jury unknown, and continuing to the date of this indictment, in the Northern District of Indiana, and elsewhere, GARLAND JEFFERS, defendant herein, knowingly and unlawfully did engage in continuing criminal enterprise in that he did distribute and possess with intent to distribute heroin, in amounts

to the Grand [1062] Jury unknown, a Schedule I Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), a felony, and cocaine, a Schedule II Narcotic Drug Controlled Substance, in amounts to the Grand Jury unknown, in violation of Title 21, United States Code, Section 841(a)(1), a felony and undertook such distribution in concert with five or more other people, with respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial income in violation of Section 848, Title 21 of the United States Code."

To this charge the defendant has entered a plea of Not Guilty.

[27] The [indictment] is not evidence of defendant's guilt. It is merely the formal manner by which the government accuses a person of crime in order to bring him to trial. The jury must not be prejudiced against a defendant because an [indictment has been returned] against him.

[29] Title 21, of the United States Code, gives a definition of a continuing criminal enterprise as follows:

For purposes of this section a person is engaged in a continuing criminal enterprise if, he violates any provision of this subchapter, or subchapter 2 of this chapter, the punishment for which is a felon, and such violation is a part of a continuing series of violations of this [1063] subchapter or subchapter 2 of this chapter, which are undertaken by such person in concert with five or more other persons with respect to whom such persons occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources.

[30] The violation which the Government must prove as the first element of its case against the defendant may be a violation of Title 21 of the United States Code, Section 841(a)(1) of the United States Code, which provides in part as follows:

Except as authorized (by law), it shall be unlawful for any person knowingly or intentionally . . . to dis-

tribute . . . or possess with intent to . . . distribute . . . a Controlled Substance.

The elements of the crime set forth in the above section, so far as here relevant, are that an individual or individuals:

Distributed or possessed with intent to distribute a Schedule I or a Schedule II Controlled substance;

That such distribution or possession with intent to distribute was done knowingly and intentionally and with specific intent.

[31] The violation which the Government must prove as the first element of its case against the Defendant, [1064] as an alternative to a violation of 21 USC Section 841(a)(1), may be a violation of Title 21 of the United States Code, Section 846, which reads in part as follows:

Any person who . . . conspires to commit any offense defined in this subchapter is . . . guilty of an offense against the law of the United States of America.

The offense against the United States that was allegedly the object of the alleged conspiracy charged in the indictment was conspiracy to violate Section 841(a)(1), Title 21 of the United States Code, which reads as set forth elsewhere in these instructions.

[32] In order to find Garland Jeffers guilty under this charge, you will have to be convinced beyond a reasonable doubt of each of the following essential elements:

First: The defendant committed a violation of the Federal Narcotics laws;

Second: That said violation of the Federal Narcotics law by the defendant, Garland Jeffers, is a part of a continuing series of violations by said defendant of the Federal Narcotics laws which occurred from on or about November 1, 1971, through on or about the 18th day of March, 1974;

Third: That defendant, Garland Jeffers, undertook to commit such a series of offenses in concert with five or more persons;

[1065] Fourth: That the defendant, Garland Jeffers, occupied the position of organizer or supervisor or any

other position of management with respect to such five or more persons.

The fifth and last essential element is: Proof beyond a reasonable doubt that from the continuing series of violations, if such you find, the defendant, Garland Jeffers, obtained substantial income or resources.

[33] The term "conspiracy" as it applies to this case means a combination of, or agreement between, two or more persons by concerted action to accomplish a criminal or unlawful purpose. Formal agreement between the parties alleged to be members of a conspiracy is not essential to the formation of a conspiracy, but it is sufficient if there is a concert of action of all the parties working together, with a single design for the accomplishment of a common purpose or purposes. It is a joint understanding between two or more parties, each of whom knows what the understanding is and each of whom assents to it. A conspiracy may be complete whether the offense which the parties may have agreed or conspired to commit is committed or not.

While a conspiracy involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into an express or formal agreement, [1066] or that they stated, in words or writing, what the scheme was or how it was to be effected or carried out. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act. Moreover, since a conspiracy is ordinarily characterized by secrecy, such an agreement may be inferred from the circumstances and conduct of the parties.

To be a member of the conspiracy a defendant need not know all the other members, nor all the details of the conspiracy, nor the means by which the objects were to be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the Government prove beyond a reasonable doubt that the defendant in question was aware of the common purpose, and was a willing participant, with the intent to advance the purpose of the conspiracy. In determining whether the defendant was a member of the conspiracy, if any, you the jury should consider only his

acts and statements. The defendant cannot be bound by the acts or declarations of other participants until it is established, beyond a reasonable doubt, that a conspiracy existed and that he was one of its members.

The Government is not required to prove that each member of a conspiracy committed or participated in a particular act, since the act of anyone done in further-[1067] ance of the conspiracy becomes the act of all the co-conspirators.

The guilt of a conspirator is not to be governed by the extent or duration of his participation. Some may take major parts while others may play minor roles.

All the conspirators need not have originally conceived the conspiracy, nor have participated in it from its inception. Nor need they have taken part in every step or action in its furtherance. Nor is it necessary that every conspirator knew each separate act on the part of every other conspirator or had knowledge of all the operations of the conspiracy.

Even if one entered the conspiracy after it was formed or if he engaged in it to a degree more limited than that of his co-conspirators, he is equally culpable so long as he was in fact a member of the conspiracy and joined it knowingly and intentionally.

It is not necessary that the Government prove that the conspiracy existed over the entire course of time which is alleged in the indictment. The indictment alleges that the conspiracy began on November 1, 1971, and continued thereafter up to and including the 18th day of March, 1974. If you find, however, that within that period of time all of the essential elements of this crime have been proved beyond a reasonable doubt, then the crime of conspiracy [1068] is complete. In that event the fact that the Government did not show that the conspiracy began as early as November 1, 1971, or that it continued until March 18, 1974 would not, in and of itself, be of any importance as far as the essential elements of the crime are concerned.

It is not necessary that a party have knowledge of the existence of a conspiracy before he can become a party to it. A person who has no knowledge of a con-

spiracy, but happens to act in a way which furthers an object or purpose of a conspiracy, does not by such conduct become a conspirator. A party cannot knowingly participate in a conspiracy unless he is aware of it and acts in a common understanding with the other parties to further its purpose.

The burden is upon the Government to prove the existence of such a conspiracy beyond a reasonable doubt and also to prove in the same manner the knowledge of the defendant who is alleged to have joined therein.

[34] The one overt act the Government is required to prove beyond a reasonable doubt in regard to the conspiracy does not need to be an unlawful act. It need only be an act that is done in the Northern District of Indiana to further an alleged unlawful objective of the alleged conspiracy.

The overt act need be done by only one member of the alleged conspiracy. It is not necessary that other [1069] members of the alleged conspiracy knew about the act as long as the act is done by one of the members and in furtherance of an unlawful objective of the conspiracy and during its existence.

[35] Heroin is a Schedule I narcotic drug controlled substance as contemplated by the statute, previously quoted.

Cocaine is a Schedule II narcotic drug controlled substance as contemplated by the statute, previously quoted.

[36] An act is done "knowingly" when it is done with actual knowledge of the facts and with the purpose and intent of violating the law. Unless there is a purpose and intent to violate the law, an act is not done knowingly.

An act is done "willfully" if done intentionally and with an evil intent.

An act is done "unlawfully" if it is done contrary to the law.

[36A] The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

[1070] The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

An act or failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

[37] I will now discuss in more detail and define for you the meaning of certain terms as used in the statute, Section 848, that I read to you and in these instructions relating to the five elements of the so-called continuing criminal enterprise charge.

First, you must determine, beyond a reasonable doubt, that the defendant, Garland Jeffers, is guilty of distribution of heroin or the possession of heroin with the intent to distribute and the distribution of cocaine or the possession of cocaine with the intent to distribute cocaine.

If you determine that the defendant did this, [1071] then you must determine, beyond a reasonable doubt, that the violations were part of a continuing series of violations of the Federal Drug Laws.

I charge you that the term "series" generally means three or more and that the term "continuing" means "during" "existing for a definite period" or intended to cover or apply to successive similar occurrences. Thus, you must find beyond a reasonable doubt that the defendant, Garland Jeffers, committed three or more successive violations of the Federal Drug laws over a definite period of time with a single or substantially simi-

lar purpose and within the period of time charged in the indictment.

Now, as to the third element or requirement, that is that the defendant, Garland Jeffers, committed these violations in concert with five or more persons.

The fourth element required is that if you find beyond a reasonable doubt that the defendant, Garland Jeffers, occupied a position of organizer, a supervisory position or any other position of management. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others.

[38] With regard to the second element of proof here [1072] in the indictment, that is, proof of a continuing series of violations under the 1970 Drug Abuse Act, in simple terms, the United States contends from the evidence that it has shown a continuing series of transactions by Garland Jeffers substantially in the form of distribution and possession of heroin with intent to distribute same. You must be convinced beyond a reasonable doubt that such activities, if they occurred, were not sporadic and isolated in nature, but rather were part of an ongoing and connected pattern of activity engaged in by Garland Jeffers.

Now, let me discuss with you the fourth essential element. That is the one which requires proof beyond a reasonable doubt that Garland Jeffers is an organizer or manager or person in a supervisory position. Let me say that in this connection an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise.

A supervisory position, as that phrase is used under the statute, can be defined as meaning one who manages or directs or oversees the activities of others.

[39] Now, let me take up with you some of the definitions which may be important under the fifth requirement or element that Mr. Garland Jeffers be shown to have obtained substantial income or resources from a con-

tinuing series of violations [1073] of the Drug Abuse Act of 1970.

First of all, I point out to you that in the context of this count and the underlying statute, "substantial" means something that is real or actual.

Furthermore, the word "substantial" connotes something having considerable or ample size or value.

Finally, I instruct you that the word "income" here can be simply defined as money or other material resources or property received or gained directly from illegal narcotics transactions by the defendant in question.

Incidentially, I instruct you also that it does not necessarily mean net income. That is to say, it could mean gross receipts or gross income.

From what I have already said, ladies and gentlemen of the jury, it would follow that the phrase "substantial income" in this kind of a charge should be construed as far as possible in an objective manner. That is to say, in order to support a conviction under this charge, you should find that Garland Jeffers received what any reasonable persons would consider to be considerable or ample funds from engaging in a continuing activity of distributing heroin as an organizer or supervisor or manager.

Put differently, it would be insufficient to support any conviction here if all you were to determine was that although Garland Jeffers was guilty as to the [1074] charge, he obtained only occasional moderate sums of money or resources in connection with any distribution of heroin.

[40] You are further instructed that it is not sufficient that the Government show that the "Family" organization received a large amount of gross receipts from the sale of drugs; the Government must prove, beyond a reasonable doubt, that the defendant, personally, received a large amount of money and that it was his and not the "Family's." In other words, before you may consider the monies in the defendant's possession as his income you must find beyond a reasonable doubt that the defendant received this income subject to his unfettered command and which he was free to enjoy at his option.

Before such monies received by Garland Jeffers can be considered his income, you must find beyond a reasonable doubt that Garland Jeffers was free to dispose of the money at his will.

[41] I want to impress upon you that you, the jury, are the sole judges of the facts from all of the evidence.

I, as presiding Judge, am charged with the duty of directing the trial along paths of recognized procedure.

In executing my duty, I may have said or done things during the course of this trial that some of you might interpret as my views on the weight of the evidence or the credibility of the witnesses if I were deciding the case. I request you to disregard such a conclusion [1075] as I intended only to decide questions of law and handle the procedure of the trial.

If I saw fit in some instances to ask questions of any witness, this must not influence you, but such witness and evidence must be considered by you like all other witnesses and evidence. Such conduct on my part does not indicate in any way that I have an opinion one way or the other as to the issues, facts, or credibility of the witness. What the weight of evidence is and the credit or belief is, to be given to each and all witnesses must be determined by you and you alone.

If I have said or done anything which has suggested to you that I am inclined to favor the claims of or positions of either side, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed nor have I intended to express, any opinion as to what witnesses are or are not worthy of credence, and what inference or inferences should be drawn from the evidence adduced in this case.

[42] I instruct you that the matter of the punishment to be inflicted, if a verdict of guilty is reached, is not before you, the jury, but that this is a matter for the court to determine or fix. The only matter before you is the question of whether or not the defendant is guilty or innocent of the crime charged in the indictment.

[1076] [43] The verdict must represent the considered judgment of each juror. In order to return a verdict,

it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

[44] Upon retiring to the jury room, you will select one of your number to act as your foreman, and the foreman may be either male or female. The foreman will preside over your deliberations and will be your spokesman here in Court.

Forms of verdict have been prepared for your convenience, two of them. They read as follows: We the Jury find the Defendant Garland Jeffers not guilty as [1077] charged in the indictment. The other form reads: We the Jury find the Defendant Garland Jeffers guilty as charged in the indictment.

You will take these forms to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date, and sign the form to state the verdict upon which you unanimously agree as to the defendant, and then return with your verdicts to the Court.

Ladies and Gentlemen, for the last eight days you have been told that you were not permitted to discuss this case. The point in time has now arrived where it is your duty to discuss and determine this case. You may now retire and do so. The alternates will remain in the court room.

Swear the Bailiffs.

SUPREME COURT OF THE UNITED STATES

No. 75-1805

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed October 4, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

SUPREME COURT OF THE UNITED STATES

No. 75-1805

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES

ON CONSIDERATION of the motion of the petitioner for leave to proceed further herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 8, 1976

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